

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO
MOTION OF UNITED PARCEL SERVICE TO COMPEL RESPONSES TO
INTERROGATORIES UPS/USPS-1-7 (except 5(g)) and 9-20
(June 18, 1999)**

On May 14, 1999, UPS filed interrogatories and requests for production of documents UPS/USPS-1-24. On May 25, the Postal Service filed general and specific objections to UPS's discovery request. On June 8, UPS filed its Motion to Compel Responses to Interrogatories UPS/USPS-1-7 (except 5(g)) and 9-20 (hereinafter "UPS Motion to Compel"). The Postal Service hereby responds to UPS's Motion to Compel.

I. PRELIMINARY STATEMENT

In view of the unusual circumstances of this proceeding, the Postal Service filed detailed and comprehensive objections to interrogatories and requests for production UPS/USPS-1-24. The Postal Service submits that all of its objections can be sustained on the basis of its initial filing. Nevertheless, the Postal Service responds to some of the specific issues raised in the UPS Motion to Compel.

Under proposed Special Rule of Practice 2B, answers in opposition to a participant's motion to compel discovery requests "will be considered supplements to the arguments presented in the initial objection." P.O. Ruling No. C99-1/2, Attachment A. Consistent with proposed Special Rule 2B, the Postal Service will not endeavor to repeat the arguments presented in its objection, but rather will supplement those arguments in order to respond to the certain arguments raised in UPS's Motion to Compel. The Postal Service does not intend this document to embody all of the grounds supporting its objections to interrogatories 1-7 (except 5(g)) and 9-20 or that its

silence in the instant motion on a ground raised in its initial Objection constitutes waiver; rather, the instant pleading is simply intended to supplement the Postal Service's initial objections.

II. GENERAL OBJECTION

UPS claims that Order No. 1239 enables participants to conduct discovery on the Postal Service, and that the Commission's Rules of Practice and Procedure authorize discovery without limitation. UPS accordingly claims the Postal Service's general objection to discovery is "frivolous" and amounts to a delay tactic. UPS Motion to Compel at 3-4.

UPS misapprehends the Postal Service's intent. The Postal Service has absolutely no intention of introducing delay in this proceeding. To the contrary, the Postal Service has consistently expressed its interest in achieving swift resolution of the controversy at hand, and has sought to persuade the Commission to narrow the issues first in order to expedite matters. In particular, the Postal Service has sought to impose limits on the scope of this proceeding and on the subject matter of discovery so as to avoid the distractions generated by protracted motions practice. The Postal Service has thoroughly explained and supported its objection with Commission precedent from Docket No. C96-1 and statutory authority. Briefly, the Postal Service has explained that this proceeding is unusual, because it commenced with the filing of a complaint, as opposed to a Postal Service-initiated rate and classification request with supporting testimony and evidence. Complainant's status as a competitor contributes to the unique circumstances of this complaint proceeding. The Postal Service has therefore

cautioned throughout its pleadings in this docket that the Commission must exercise extreme caution to protect the integrity of the complaint process.¹ Furthermore, the Postal Service has demonstrated that limitation of issues is not only a reasonable means of imposing discipline on the parties, but is also expressly contemplated by 39 U.S.C. § 3624, which authorizes the Commission to adopt rules that would define and thus "insure orderly and expeditious proceedings."

UPS incorrectly represents that Order No. 1239 authorizes discovery. To the contrary, nothing in the Order authorizes the commencement of discovery on the Postal Service. The Postal Service acknowledges that the Order contemplates a period of discovery on the Postal Service, Order No. 1239 at 22, although nothing in the order prevents the participants from insisting upon a reasoned and balanced limitation of the issues prior to the initiation of discovery on the Postal Service. In sum, the Postal Service's general objection is sound, reasonable, and consistent with Commission precedent.

¹ See, USPS Comments on the Special Rules of Practice (June 8, 1999); USPS Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2 (June 8, 1999); USPS Response to UPS Motion for Protective Order (May 25, 1999).

IV. SPECIFIC OBJECTIONS²

Interrogatories UPS/USPS-2, 3 (in part), 4, and 20(a). Interrogatories 2 and 4 request that the Postal Service provide specific volume information on Post E.C.S. transactions. Interrogatory 2 asks for aggregate volumes, while interrogatory 4 asks for total volume figures showing the total number of transactions from servers located in the United States or a foreign country. Interrogatory 3 requests information on the proportion of transactions initiated to or from the United States. Interrogatory 20(a) requests the number of licensed Post E.C.S. users. The Postal Service has objected to these interrogatories on grounds of relevance and commercial sensitivity.

In its Motion to Compel, UPS claims that these interrogatories are intended to elicit information to evaluate the relative proportion of U.S. domestic and international usage of Post E.C.S. UPS Motion to Compel at 4-5. UPS suggests that the interrogatories request a seemingly innocuous "statistical profile" to gauge cross-border usage of the service. To the contrary, these questions seek irrelevant information and are geared towards obtaining commercially sensitive information about Postal Service's success to date with the Post E.C.S. test. The total number of licensed users and transactions would give competitors clear information about the Postal Service's

² UPS states that it "will not press for answers" to UPS/USPS-8, 21-24, but nevertheless reserves the right to "press for answers . . . at a later point in this proceeding." UPS Motion at 3 n.3. The Postal Service likewise intends to preserve its objection to these interrogatories, and objects to the extent UPS seeks to reintroduce these discovery requests at any point in this proceeding when they would otherwise be filed out of time

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success with the Post E.C.S. test to date. Furthermore, cross-border volumes and proportions are also commercially sensitive.³ Even if the Postal Service had responsive information on cross-border traffic, it would be commercially sensitive. It would enable competitors to gain market information that could be used to strategically target communications markets where the Postal Service enjoys a measure of success, and redirect their energies away from markets where volumes suggest traffic is much less attractive. Disclosure of this information would place the Postal Service at a serious disadvantage.

UPS's Motion to Compel also incorrectly equates Post E.C.S.'s volume statistics with those for competitive *postal* services, such as Priority and Express Mail.⁴ With the exception of Mailgrams, for which reporting requirements were established by a stipulated settlement in Docket No. MC76-5, the Postal Service is under no requirement

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under the procedural schedule or the Special Rules of Practice.

³ As the Postal Service pointed out in its response to question 2 to Order No. 1229, the Postal Service has "no reliable means of determining where (geographically) Post E.C.S. transactions originate and destinate; once a company is authorized to use Post E.C.S., specific transactions can originate from or be sent to any location that has internet access." Consequently, even if UPS's motion to compel is granted, the Postal Service will report having no information responsive to the questions 3 and 4. The Postal Service nonetheless maintains its objections on principle.

⁴ It is important to note that under Section 102(a)(10) of the Commission's Rules of Practice and Procedure, the filing of billing determinant information for competitive categories, including Express Mail, Priority Mail and Parcel Post, may be delayed for up to one year. This provision grew out of the Postal Service's concern, expressed in Docket No. RM89-3, that the provision of this information would result in commercial harm to the Postal Service. See 54 Fed. Reg. 35,491 (August 28, 1989). This concern applies here as well, particularly given the competitive nature of the market in which Post E.C.S. operates.

to file volume statistics for nonpostal services with the Commission, or make them available to the public under the Commission's reporting rules.⁵ To accept UPS's argument that Post E.C.S. volume statistics are equivalent to those for postal services such as Priority Mail requires that one prejudge the ultimate issue of whether Post E.C.S. is a postal service subject to Commission jurisdiction. Surely, the Commission is not prepared to make such a leap without opportunities for the participants to be heard, as it has indicated it will do in Order No. 1239.

Finally, as a separate matter, the Postal Service objected to the extent information about the foreign posts' customers or licensees falls within these requests. UPS claims that it is not "seeking information about the foreign posts' volumes" in interrogatories 3 and 4. UPS Motion to Compel at 6. In an apparent attempt to assuage the Postal Service's concerns about disclosure of the foreign posts' information, UPS has offered to combine subparts 3(b) and 3(c) and subparts 4(c) and 4(d). UPS Motion at 6. Yet this measure does not overcome the objections the Postal Service has raised in connection with these interrogatories, *i.e.*, commercial sensitivity, relevance, and jurisdiction, particularly with respect to information about the foreign posts' transactions and volumes. UPS's offer to combine these subparts does nothing to narrow the scope of these interrogatories to the Postal Service's licensees' usage patterns; rather, it is conceivable that portions of the foreign posts' volumes could still

⁵ Indeed, Rules 54(b)(4) and 64(b)(4) merely require that the Postal Service *identify* nonpostal services in the compliance statement of a rate and classification request.

fall within the scope of UPS's interrogatories, even as narrowed.⁶ The foreign posts' transactions with their domestic customers have no bearing on the Commission's resolution of the legal nature of the Postal Service's product and are not within the scope of this proceeding. Such information only gives UPS a better understanding of the markets in which LaPoste and Canada Post Corporation operate, and would signal whether these markets are ripe for more focused competition. Such information, moreover, is clearly "privileged or confidential information provided by a person" that is subject to withholding in a FOIA context under exemption 4. *See Stone v. Export-Import Bank*, 552 F.2d 132, 137 (5th Cir. 1977) (concluding that foreign governmental institution is a "person" for purposes of exemption 4).

Interrogatories UPS/USPS-1(b)-(c), and 7. Interrogatories 1(b)-(c) and 7 request that the Postal Service identify and describe the functions of offices and employee positions within the Postal Service that are involved in developing, implementing, providing, and offering Post E.C.S. UPS claims that this information could reveal sharing of resources, presumably staff, supplies, and expertise, within the Postal Service, and that such information elucidates the question of whether Post E.C.S. is a "postal" service. UPS Motion to Compel at 7. This preposterous theory has no basis in law or fact. That certain organizational units and their employees could be masters of multiple disciplines does not in any way alter the nonpostal or postal

⁶ Again, the Postal Service reiterates that if UPS's Motion to Compel were granted, these interrogatories would not yield responsive information. The Postal Service nonetheless maintains its objection as a matter of principle.

attributes of a service. A service falls within the legal definition of a "postal" service not by the identity and job responsibilities of its developers and product managers, but rather by its functional characteristics. *National Assoc. of Greeting Card Publishers v. US Postal Service*, 569 F2d 570, 595-598 (DC Cir 1976) (hereinafter *NAGCP*) (finding specified special services to be postal services on grounds that each "clearly involves an aspect in the posting, handling and delivery of mail matter"), *vacated on other grounds, US Postal Service v. Associated Third Class Mail Users*, 434 U.S. 884 (1977).

UPS's Motion, moreover, reveals that its discovery is politically motivated and beyond the scope of this proceeding. It frankly admits that its interrogatories are intended to obtain information to show "the potential subsidization of Post E.C.S. by mail services." UPS Motion to Compel at 8. This matter is well beyond the scope of this proceeding. The relationship between costs and revenues for Post E.C.S. would only be relevant if a request for a rate and classification for this service were pending before the Commission. This is clearly not the case. The issue before the Commission should be a narrow legal question. *i.e.*, whether Post E.C.S. is a "postal" service for purposes of Chapter 36 of Title 39. Allegations of cross-subsidization in connection with Post E.C.S. are well outside the scope of this proceeding, and have instead been the subject of inquiries by other governmental institutions. *See, e.g.*, GENERAL ACCOUNTING OFFICE, US POSTAL SERVICE DEVELOPMENT AND INVENTORY OF NEW PRODUCTS, GAO/GGD-99-15 (November 1998) at 1 n.2. The Commission should protect the integrity of its complaint process from these sorts of improper fishing expeditions, the fruits of which undoubtedly are intended for other audiences.

Furthermore, as stated in the Postal Service's objection, the interrogatories are invasive and geared towards uncovering the deliberative process within the Postal Service. Commission precedent makes clear that "the decisional processes" whereby services are brought into being "have no bearing on the qualities of the service[s] [themselves]." Rather, such information is of "very attenuated relevance, at best" See P.O. Ruling No. C96-1/5 at 5. In sum, the requested information is not only privileged but also irrelevant to a determination of Post E.C.S.'s legal status.

Interrogatory UPS/USPS-5 (introductory subpart). The introductory subpart to interrogatory 5 requests all documents "referring or relating to Post E.C.S." The Postal Service objected to this subpart on grounds of privilege, commercial sensitivity, and relevance.

As the Postal Service stated in its initial Objection, the introductory subpart to interrogatory 5 is vague, overbroad, and unduly burdensome. Numerous postal employees have been involved in this project in some capacity, and a search of their files for responsive documents would consume countless hours of search time of electronic and paper records. UPS's offer in its Motion to Compel to exclude "technical materials" does little to mitigate the burden required in responding to this interrogatory. The Post E.C.S. test has been in operation for over one year. See Partial Response of USPS to Order No. 1229. It is estimated that there are thousands of pages of communications on the many facets of Post E.C.S. that would not qualify as "technical materials." The undersigned counsel's Post E.C.S. files, which do not contain technical materials, measure approximately one foot in height. The time and effort required to

search the records of all persons having some responsibility related to Post E.C.S. would beyond question consume hundreds of hours of professional time.

Second, the interrogatory would require the production of many documents that are covered by the attorney-client, work product, and deliberative process privileges. While UPS implicitly concedes that such privileged documents need not be provided, UPS Motion to Compel at 9, UPS trivializes the Postal Service's invocation of the attorney work product privilege, claiming that it "stretches credulity" to suggest that the attorney work product privilege extends to Post E.C.S. documents. UPS Motion at 10 n.8. What stretches credulity is not the Postal Service's objection, but rather UPS's naïve understanding of just how broad and invasive its discovery request is. The discovery request contains no bounds; consequently, its coverage arguably includes all attorney work prepared in connection with this litigation, including drafts of this document. It is beyond question that these documents are within the scope of the attorney work product doctrine. This simply illustrates the unreasonableness of UPS's discovery request.

UPS also demands the production of a "privilege log" for all privileged documents. UPS would require the Postal Service to identify the date, subject matter, author, recipients, and general contents of each responsive document withheld pursuant to privilege. UPS's insistence on a privilege log, or "*Vaughn* index,"⁷ represents an unprecedented and unwarranted change in Commission practice having absolutely no

⁷ The concept of a *Vaughn* index derives from *Vaughn v. Rosen*, 484 F.2d 820 (D.C.

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basis in the Commission's Rules of Practice and Procedure. Rule 26 of the Commission's Rules of Practice and Procedure requires an objecting party to identify *the privilege asserted*.⁸ There is absolutely no requirement to produce a list showing the date, subject matter, author, recipients, and general contents of each document withheld pursuant to privilege. In short, nothing in the Commission's rules requires the preparation of a *Vaughn* index in the context of motions practice related to discovery. Furthermore, UPS misplaces reliance on P.O. Ruling No. R97-1/40. The underlying controversy resolved by that ruling involved redacted attachments to a library reference reviewed by a postal consultant in connection with the preparation of his testimony. OCA sought to compel these documents over the Postal Service's privilege objection. The Presiding Officer ruled that the Postal Service must produce a log of the withheld documents, *id.* at 4-5, but only because the Postal Service had not demonstrated the existence of the privilege to the Presiding Officer's satisfaction:

without knowing the nature of specific components of the attachment, the blanket claim of privilege made by the Service has not been adequately justified. Consequently, in order to make more particular findings, I shall direct the Postal Service to produce a detailed index of the attached material, as OCA has suggested. A detailed justification for each claim of privilege or protection shall accompany the index

P.O. Ruling No. R97-1/40 at 5. The Ruling is clearly distinguishable and limited to its facts. The controversy there involved a narrowly focused discovery request, *i.e.*,

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Cir. 1973), *cert. denied*, 415 U.S. 977 (1973).

⁸ Under Rule 26(c) of the Commission's Rules of Practice and Procedure, the objecting party must "identify the specific evidentiary *privilege* asserted and state the reasons for

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attachments to a library reference, and documents relied on by the objecting party's witness. Furthermore, the index was required in order to enable the Presiding Officer to make further findings on the objection. *Id.* at 5. There was no need to engage in a far-reaching and burdensome search of all records for responsive documents for the purpose of producing a "privilege log." By contrast, in this proceeding, UPS seeks a *Vaughn* index covering all privileged communications, without any constraints placed on the scope of such a log. To require a *Vaughn* index in this context would not only give UPS substantial insights into the Postal Service's decisionmaking and advisory processes, but also require a monumental effort that would consume several days or weeks of attorney time. In short, preparation of a *Vaughn* index would only augment the burden associated with this discovery request.

In addition, UPS's claim that the practice of using a *Vaughn* index is "commonly done in civil litigation," UPS Motion to Compel at 9, is misleading. To the contrary, the leading authority on civil procedure concludes that "[t]he basic objective is a sufficient description of the matters withheld to satisfy the needs of the case; rigid insistence on certain logging or indexing procedures may go well beyond that, particularly in larger cases." 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.1 (2d ed. 1994). These principles apply in this proceeding. Except in extraordinary circumstances where the Presiding Officer believes more information is necessary or a party has behaved in bad faith, see *id.* § 2016.1 at 231-32, there is no need for

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its applicability." 39 C.F.R. § 3001.26(c) (emphasis added).

participants to engage in the burdensome task of preparing unusually detailed logs in order to preserve privilege objections.

Finally, the interrogatory fails to limit its scope to exclude the confidential information of other stakeholders. Taken at face value, the interrogatory would require the production of draft and final documents that contain commercially sensitive or proprietary information or trade secrets of the other stakeholders, including the International Post Corporation (IPC), Canada Post Corporation, and La Poste, as well as their suppliers, contractors, and customers. Information related to the stakeholders is well beyond the scope of this proceeding. Such information must be shielded from disclosure, not only on grounds of commercial sensitivity, jurisdiction, and lack of relevance, but also because disclosure under any circumstances would seriously undermine program effectiveness, as discussed below.

Interrogatory UPS/USPS-13. Interrogatory 13 requests memoranda, studies, reports, analyses, and recommendations on whether the Postal Service should provide Post E.C.S. In footnote 8 of its Motion to Compel, UPS withdraws any request for “recommendations”, but it seeks to compel analyses and factual material which underlie any recommendations.

In its Objection, the Postal Service identified potentially responsive documents to this request to include the following: attorney-client communications, legal analyses prepared by attorneys in anticipation of and in connection with litigation, memoranda to executives from attorneys and managers, a preliminary business plan for Post E.C.S., an analysis performed by IPC for the Postal Service and the other foreign posts, as well

as drafts of some of these documents. The Postal Service objected to this interrogatory on grounds of deliberative process privilege, work product privilege, and relevance.

With respect to the Postal Service's objection on grounds of privilege, UPS again seeks the production of a *Vaughn* index. UPS Motion to Compel at 11. As stated above, such a drastic measure is unnecessary and far beyond what is required by the Commission's Rules of Practice. Furthermore, production of a *Vaughn* index would be particularly invasive and would give UPS substantial insights into the Postal Service's policymaking and advisory processes.

With respect to relevance, UPS suggests that responsive information could reveal evidence about substitutability in relation to other postal services. UPS Motion to Compel at 10-11. As the Postal Service pointed out in its initial Objection, substitutability is not germane to the question of a product's legal status, and UPS offers absolutely no statutory or judicial authority that supports a contrary proposition. Courts that have considered this matter have instead considered a product's functional characteristics in determining whether services are "postal" in a jurisdictional sense. See *NAGCP*, 569 F.2d at 595-598. Even assuming the relevance of substitutability to this proceeding, UPS fails to distinguish Commission precedent in Docket No. C96-1, which finds information underlying the decisionmaking process for a product to be outside the scope of permissible discovery. In that proceeding, the Presiding Officer concluded that "the decisional processes whereby [the challenged] service was brought into being . . . [have] no direct bearing on the qualities of the service itself." P.O. Ruling No. C96-1/5. UPS attempts to distinguish this ruling by tying its request to a

substitutability theory. If that is UPS's purpose, its discovery request suffers from overbreadth. The decision to offer any given service involves far more than a simple analysis of cannibalization of existing services. Rather, it is a complex exercise that requires a review of market, financial, operational, and policy considerations. To require the Postal Service to provide background information relating to its decisionmaking on Post E.C.S., even if limited to factual information, would still tread into many irrelevant and commercially sensitive topics that are well beyond the scope of this proceeding.

Disclosure of such information would, moreover, pose a risk of substantial competitive harm to the Postal Service, for it would signal to competitors the product's vulnerabilities and strengths. Furthermore, some of this information is intertwined with recommendations made to, and information provided by, other stakeholders, and such information, apart from being irrelevant to this proceeding, constitutes the proprietary commercial information of these other entities.

Finally, UPS's offer to limit its discovery request to factual information does not overcome the Postal Service's deliberative process privilege objection. Although courts have recognized a distinction between factual information and deliberative discussion for purposes of FOIA exemption 5, factual summaries used in making complex decisions can be part of the deliberative process and thus be exempt from disclosure. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974); see also *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993). The *Mapother* court addressed whether a report relating to wartime activities of former U.N.

Secretary General and President of Austria Kurt Waldheim was properly withheld under FOIA exemption 5. Plaintiffs sought disclosure of the report, including factual information contained therein. The *Mapother* court first observed that:

the fact/opinion test, while offering "a quick, clear, and predictable rule of decision," is not infallible and must not be applied mechanically. This is so because the privilege serves to protect the deliberative process itself, not merely documents containing deliberative material. Where an agency claims that disclosing factual material will reveal its deliberative processes, "we must examine the information requested in light of the policies and goals that underlie the deliberative process privilege."

Id. at 1537-38 (citations omitted). The *Mapother* court decided that protecting factual information may be needed to protect the deliberative process itself:

the selection of the facts thought to be relevant clearly involves "the formulation or exercise of . . . policy-oriented judgment " or "the process by which policy is formulated," in the sense that it requires "exercises of discretion and judgment calls." Such tasks are not "essentially technical" in nature; rather they are part of processes with which "the deliberative process privilege ... is centrally concerned." Given the need for deliberation to inform discretion and for confidentiality to protect deliberation, we have felt bound to shelter factual summaries that were written to assist the making of a discretionary decision.

Id. at 1539 (citations omitted). The court held that "the great bulk of the Waldheim Report" was properly withheld under FOIA, as the information contained therein was protected by the deliberative process privilege.

The *Mapother* court's reasoning applies with equal force here. The type of factual information that has been used in Post E.C.S. decisionmaking is not akin to information in the public domain. Rather, disclosure of information used as inputs to the decisionmaking process would reveal judgment and policy considerations of those involved in evaluating whether the Postal Service should offer Post E.C.S. Disclosure

of even the factual information in the reports would therefore compromise the decisionmaking process. Consequently, the Postal Service should not be required to produce factual information in privileged reports used as inputs to deliberations on whether the Postal Service should offer Post E.C.S.

Interrogatories UPS/USPS-5(e). Subpart (e) of interrogatory 5 requests plans for future marketing of Post E.C.S. In its initial Objection, the Postal Service identified some marketing plans that were previously prepared and that are in the process of being executed. These include: a Post E.C.S. pilot plan prepared by the Postal Service, Canada Post, and LaPoste;⁹ media plans prepared by and for the Postal Service; and a summary of IPC's marketing activities.

To the extent information about the foreign posts, foreign markets, or IPC falls within this discovery request, the Postal Service reiterates its objection on grounds of commercial sensitivity, relevance, and jurisdiction. In addition, to the extent the plans contain recommendations and predecisional deliberation, they are privileged. With respect to information relating to the Postal Service, the Postal Service emphasizes that this information is highly sensitive and should not be disclosed under any

⁹ A review of the table of contents of this document reveals its highly sensitive nature. This includes analysis and summaries of trends in communication; implications; market trends; benefits; service overview; objectives and measurement criteria; volume assumptions; analysis of strengths, weaknesses, opportunities, and threats; positioning; competitive overview; customer profile; pricing; customer invoicing; customer support; reporting; methodology; market research; and data analysis. All of this information is commercially sensitive and proprietary. Moreover, to the extent the plans embody recommendations, they are protected by the deliberative process privilege.

circumstances. The factual information contained in the plans would reveal thought processes and strategic decisionmaking, and, consistent with *Mapother*, such information is entitled to protection as its disclosure would compromise the deliberative process.

Interrogatories UPS/USPS- 5(b), (c), 6, and 12 (descriptions and instructions). These interrogatories request instructions, training materials, marketing materials and motivational tools given to Postal Service employees and contractors. The Postal Service objected to these interrogatories on grounds of relevance, except to the extent that they contain product descriptions. These interrogatories are also objectionable on grounds of commercial sensitivity in the context of the subject matter of this proceeding.

UPS claims that the Postal Service's procedures and training manuals are "not commercially sensitive materials." UPS Motion to Compel at 13. This is not so. Again, the fallacy in UPS's argument is that its Motion to Compel prejudices the open question of whether Post E.C.S. is a "postal" service for jurisdictional purposes. The Postal Service maintains that it is not, and in this circumstance, given the competitive nature of the market in which Post E.C.S. operates, the Postal Service's operating procedures, training manuals, and marketing and motivational tools are of enormous commercial value. As the Postal Service pointed out in its initial Objection, the Commission has recognized that standard operating procedures for competitive products are commercially sensitive and deserve protection from public disclosure. P.O. Ruling No. MC97-5/6 concluded that "valuable, proprietary instructions provided by [CMRA]

franchisors to their franchisees" are commercially sensitive. Similarly, the Postal Service's training and operational manuals for Post E.C.S. are of enormous value to competitors. Competitors could benefit by (i) copying and using them to develop and market services in competition with Post E.C.S., (ii) comparing their effectiveness to their own procedures and tools, and (iii) gauging the Postal Service's future plans for the service. Thus, instructions to postal employees, training manuals, motivational tools, and operational manuals on how to provide Post E.C.S. are entitled to complete protection and should not be disclosed.

Interrogatories UPS/USPS-5(a) (in part), 5(d), 10 (solicitations, advertising) (in part) and 12. These interrogatories request the production of promotional materials, coupons, advertisements, solicitations, and marketing materials.

Interrogatory 5(d) goes even further and requests all communications sent to customers or potential customers. The Postal Service objected to these interrogatories, in part or in their entirety, on grounds of relevance, commercial sensitivity, and undue burden.

As stated in its initial Objection, the Postal Service is prepared to concede the relevance of its promotional materials, advertising, solicitations, and marketing materials only to the extent that they contain descriptions of the attributes and workings of Post E.C.S.¹⁰ UPS contends that once names of customers are removed from advertising and solicitations sent to specific customers, the Postal Service loses any

¹⁰ Again, the Postal Service objects to the extent any information of other stakeholders is requested. Such information is irrelevant and the commercial or proprietary information of those entities.

"colorable claim" of commercial sensitivity. UPS Motion to Compel at 14. UPS's contention cannot be taken seriously. Surely, a request for public disclosure of UPS's communications with its customers would be met with stiff resistance. Disclosure of such items, which by definition are not widely available, would give competitors insight into strategic marketing for Post E.C.S. It would show thought processes, sales tactics, and marketing strategy. This not only enables competitors to evaluate the Postal Service's marketing strategies for this product, but also invites competitors to appropriate for their own use the Postal Service's work product. Such information should not be disclosed.¹¹

With respect to mass media advertising, the Postal Service stated in its initial Objection that it does not concede the relevance of such materials, except to the extent that descriptions of Post E.C.S. are contained therein. The Postal Service therefore objected to the production of any mass media advertising, or portions thereof, that does not contain such information. UPS does not address this issue in its Motion to Compel. Any ruling granting UPS's Motion to Compel should narrow responsive information to include descriptions of the service contained in mass media advertising.

The Postal Service also objected to the production of all other communications with customers. These include communications such as boilerplate communications to new customers, responses to complaints, boilerplate notices sent to customers concerning

¹¹ To the extent this information is determined to be relevant, it should be provided only under the strict protective conditions proposed in the Postal Service's Response to P.O. Ruling No. C99-1/2.

the extension of the test, and bills for usage. UPS's Motion to Compel does not address these communications. In view of (i) their complete irrelevance to the issue at hand, (ii) the burden involved in searching, copying, and redacting these records, and (iii) UPS's silence on this issue in its Motion to Compel, any ruling granting UPS's Motion to Compel should make clear that such communications need not be provided.

Interrogatories UPS/USPS-10 (proposals and bids) and 11. Interrogatories 10 and 11 request that the Postal Service provide proposals, bids, contracts, and agreements with customers for Post E.C.S. The Postal Service objected to this interrogatory on grounds of relevance and commercial sensitivity. As indicated in its initial Objection, the Postal Service has already provided a copy of the standard terms and conditions governing customer participation in the test in the attachment to its response to Question 4 in Order No. 1230. The Postal Service stated that it had not identified any other responsive information, *i.e.*, proposals, bids, or other agreements with customers, except for a standard application form to participate in the test and a price list.

The Postal Service objected to the extent this interrogatory requested price information on grounds of relevance and commercial sensitivity. UPS states its willingness to accept responsive documents with "the pricing terms redacted." UPS Motion to Compel at 15. This appears to resolve the controversy, as there is nothing more to provide, other than the application form for participation in the test of Post E.C.S., although the Postal Service maintains its objection on grounds of principle.

Interrogatory UPS/USPS-5(f). Subpart (f) of interrogatory 5 asks for surveys of customers regarding Post E.C.S. In its initial Objection, the Postal Service identified written summaries of telephone and e-mail communications from its customers describing their experience with the product,¹² as well as researchers' and consultants' reports and analyses of customer feedback, as responsive to this request. The surveys address topics such as customers' reaction to prices, customer usage history, and suggestions for service improvement. The consultants' and researchers' reports analyze these comments and provide recommendations.

The Postal Service objected on grounds of commercial sensitivity and relevance. The Postal Service reiterates that release of customer feedback would be detrimental to its business interests, and would be of significant benefit to its competitors. Moreover, to the extent UPS compels the production of researchers' analysis of customer comments, the Commission precedent makes clear that such information is outside the bounds of permissible discovery. See P.O. Ruling No. R97-1/52 (permitting redaction, even under protective conditions, of "researchers' comments and conclusions on, and analysis and/or interpretation of, the underlying factual data"). UPS has failed to cite any authority to overcome this direct precedent. Consistent with this ruling, the Postal

¹² As stated in its initial Objection, the Postal Service does not consider market research of other post's customers to be responsive to this request. UPS's Motion does not address this matter. Any ruling addressing this question should make absolutely clear that any information about the customers, markets, operations, or policies of the foreign posts or IPC are not within the scope of any compelled response.

Service should be entitled to protect such information from any disclosure, notwithstanding UPS's invitation to apply protective conditions to the response.

UPS further challenges the Postal Service's relevance objection on grounds that information from market research would show evidence of substitutability. UPS Motion to Compel at 16. Again, the Postal Service emphasizes that substitutability is *not* a accepted legal theory governing the question of whether a service is subject to Commission jurisdiction. Even assuming the relevance of UPS's substitutability theory to the matters at issue here, if UPS seeks information on substitutability, UPS's discovery request suffers from overbreadth, and the only information subject to compelled production should relate to substitutability.

Interrogatories UPS/USPS-15, 16, and 17. Interrogatories 15-17 generally request that the Postal Service provide "all data" concerning Post E.C.S. customers' substitution of hardcopy mail services. Although the Postal Service has no quantitative data responsive to this request, the Postal Service has identified written customer feedback described above, as well as reports of the usage of two customers, as potentially responsive to this request. This is essentially the same information requested by interrogatories UPS/USPS-5(f). The Postal Service's grounds for objection to interrogatories UPS/USPS-5(f) therefore extend to these interrogatories, and need not be repeated.

Interrogatory UPS/USPS-14. This interrogatory requests that the Postal Service provide "all contracts or agreements concerning PostECS, including all agreements

between or among the Postal Service, La Poste, Canada Post Corporation, and International Post Corporation.”¹³

As explained in its Initial Objection, the Postal Service has identified a software development and license agreement executed by International Post Corporation (IPC), Tumbleweed Software, Canada Post, the Postal Service, and LaPoste and exhibits and addenda to that instrument related to Post E.C.S. as potentially responsive to this request.¹⁴ The Postal Service objected to this interrogatory on grounds of relevance, privilege, and commercial sensitivity. As the Postal Service

¹³ UPS's Motion to Compel addresses only “contracts between the Postal Service and foreign posts.” UPS apparently has not moved to compel production of other miscellaneous agreements identified in the Postal Service's initial Objection, including agreements to which foreign posts are not parties, including those for technical sales support, administrative support, help desk services, and consulting services. These have nothing to do with the issues before the Commission. Any ruling granting UPS's Motion to Compel with respect to interrogatory 14 should make clear that such agreements need not be provided, as they have not been compelled.

¹⁴ UPS's Motion to Compel requests all contracts between the Postal Service and foreign posts “concerning Post E.C.S.” UPS's Motion to Compel does not explicitly address the licensing agreements identified in the Postal Service's objection between the Postal Service and foreign posts regarding their use of the Postal Service's proprietary Electronic Postmark™ system software. These agreements confer the right on foreign posts for the use the Postal Service's proprietary Electronic Postmark™ system software in their provision of secure electronic services. The Postal Service emphasizes that licensing agreements for Electronic Postmark system software are not relevant to this controversy, as they relate to the *foreign posts'* products and provision of secure electronic services. Such licensing agreements do not pertain to the Postal Service's Post E.C.S. product. The services of other providers, such as the Canada Post and LaPoste, are not at issue here. Thus, Electronic Postmark™ software licensing agreements extended to foreign posts are well beyond the scope of this proceeding. Furthermore, the Postal Service regards any such agreements as highly confidential, as disclosure would compromise negotiating positions. Disclosure of the existence of any such agreements and of their contents cannot, moreover, be made, consistent with the terms of the agreements, until a notice provision expires.

explained in its initial Objection and its Motion for Reconsideration of Order No. 1230, the contents of documents identified by the Postal Service as potentially responsive to question 14 include highly sensitive commercial information that is not germane to the controversy before the Commission. These grounds are thoroughly explained and supported in the Postal Service's objection. Consequently, the Postal Service will simply undertake to address the rather terse arguments UPS raised in its Motion to Compel.

UPS claims the agreement's relevance is established by virtue of the Postal Service's statement in its Motion to Dismiss that Post E.C.S. is a "global service." UPS Motion to Compel at 17. UPS's reasoning is faulty. The Postal Service has never represented that the agreement proves that the service is global in nature. Rather, it is, *inter alia*, the posts' cooperation and sharing of product management expertise and resources, IPC's leadership role in product design, co-branding, and the service's utility in cross-border communications that establish the global nature of the service. The licensing agreement merely enables the parties to obtain the rights to software needed to run the service. Descriptions of the contents of the agreement, which already have been set forth in two pleadings, beyond question establish that there is absolutely nothing in the agreement that informs the legal status of Post E.C.S. Simply put, the agreement is not germane to the controversy before the Commission.

UPS also contends that the agreement is a "public document" and must be released. The Postal Service is but one of five parties to the agreement. The agreement contains much more than the simple unit price terms of a government

procurement contract. By its terms, it contains the parties' collective "confidential information", which is defined to include, *inter alia*, the "material financial terms" of the agreement. Each party is obligated to hold the other parties' information in confidence. Thus, it confers rights to, and obligations on, all parties with respect to information contained in, and generated in connection with, the agreement. The parties to the agreement have reasonable and necessary expectations of confidentiality in connection with the agreement, and these should not be disturbed, particularly at the compelled request of an acknowledged competitor. Furthermore, UPS cites no court precedent showing that a multi-party agreement such as the one at issue here must be disclosed in a FOIA context. Indeed, given that the confidential information of three posts and two corporations is at stake here, court precedents upholding decisions in FOIA contexts to withhold, under exemption 4, confidential information submitted by persons are controlling in this circumstance. See, e.g., *Environmental Technology, Inc. v. U.S. Environmental Protection Agency*, 822 F. Supp. 1226 (E.D. Va. 1993) (enjoining agency from disclosing contractor information under FOIA); *Burke Energy Corp. v. Department of Energy*, 583 F. Supp. 507 (D. Kan. 1984) (upholding agency's withholding of documents relating to agency audit of oil company); *Timken Co. v. U.S. Customs Service*, 491 F. Supp. 557 (D.D.C. 1980) (price and quantity data supplied by importer protected).

Finally, disclosure under any terms would seriously jeopardize program effectiveness. See *Comstock International v. Export-Import Bank of the United States*, 464 F. Supp. 804 (D. D.C. 1979). In *Comstock*, the court upheld the refusal of the

Export-Import Bank of the United States to disclose a loan agreement to which the Bank, an independent federal agency, the Chase Manhattan Bank, and Sonatrach, a foreign oil and gas company, were parties. The agreement related to a construction project financed by a loan from the agency. The court pointed out the likelihood that disclosure of the agreement would significantly impair the bank's function of promoting United States exports. In addition, the court stated that disclosure of the reports would result in substantial harm to the competitive position of the suppliers of the information.

Similarly, here, disclosure in any form of the licensing agreements would seriously undermine program effectiveness. It would reveal information indicating the costs and profitability of Post E.C.S. service, permanently harm the Postal Service and the other parties to the agreement, and forever impair the Postal Service's ability to enter into strategic business initiatives with IPC and the foreign posts.


CONCLUSION

WHEREFORE, the Postal Service requests that the Commission deny UPS's Motion to Compel responses to interrogatories UPS/USPS-1-7 (except 5(g)) and 9-20. Prior to ruling on UPS's Motion to Compel, the Postal Service respectfully requests that the Presiding Officer rule on the Postal Service's Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2, in order to limit issues for purposes of discovery.

UNITED STATES POSTAL SERVICE

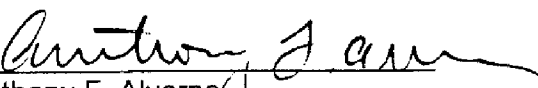
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


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